No. 11,934

IN THE

United States Court of Appeals

For the Ninth Circuit

WARREN L. HAGER,
Appellant,

vs.

CLYDE E. GORDON,
Appellee.

BRIEF FOR APPELLANT.

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This action was filed in Fairbanks, Alaska, on May 13, 1947, and various amendments were made and on the 1st day of October, 1947, the second amended complaint was filed. This second amended complaint contained two causes of action; one for a judgment requiring the defendant to return and restore to the plaintiff a certain river boat known as "Elaine G" and a power-driven barge used in connection therewith, or, if the return could not be had, then for judgment for $25,000.00 the value thereof (T.R. pp. 2, 3 and 4) and contained a second cause of action praying for damages in the sum of $10,000.00. To this complaint there was an answer filed which denied a good part of the allegations, and contained an affirmative defense in which the defendant claimed to own the boat and barge, and admitted possession

thereof. (T.R. p. 6.) A reply was filed which denied all affirmative matter set forth in the answer and plaintiff prayed to recover as in his original complaint. Judgment was rendered for the defendant, plaintiff appealed and is appellant here. This action was based on the Compiled Laws of Alaska, 1933, generally but especially Chapter LXXX.

It will be noted that Alaska has no statute on replevin, but this is the nearest substitute for replevin and is referred to there as claim and delivery, or recovery of personal property.

There was no bond given in this case and the property was not taken from the defendant, who then had possession thereof.

The right of appeal from the District Court of the Territory of Alaska to this Honorable Court is provided for by Chapter CXIX, Compiled Laws of Alaska, 1933, at page 802.

This appeal was duly perfected and lodged in this Court within the time allowed by law and by the extensions granted by the District Court of the Territory of Alaska.

"STATEMENT OF POINTS RELIED UPON FOR REVERSAL."

I.

The first point appellant relies upon for reversal are the errors of the Court in the instructions as were set out in two motions for a new trial filed before the Court, and in the notice of appeal; also, the assign-

ment of errors. The overruling of each of the motions for a new trial are assigned as error, and on this our first point relied upon for reversal, we call your attention to the instructions printed in the transcript, commencing on page 10 and extending down to and including page 18.

In our motion for a new trial filed in compliance with a rule of the District Court at Fairbanks on January 31, 1948, three days after the verdict was rendered, we objected to many of the instructions, all of which we had saved exceptions to, and our exceptions were allowed by the Court. (Note T.R. pp. 20, 21, 22.)

In Instruction 1A (see T.R. p. 10), after setting fourth plaintiff's claims in paragraphs 1, 2 and 3, the following requirement was set forth:

> "4. That at all times *before such earnings of said boat and barge paid off the cost of building, equipping and operating the same,* the plaintiff, Hager, was to be the owner of said boat and barge." (Emphasis ours.)

Which places too great a burden on the plaintiff, and did not state the law correctly, and this is especially true when it was followed with paragraph "B", which is as follows:

> "You are instructed that if the plaintiff, Hager, has proved, by a preponderance of the evidence in this case, each of the matters set forth in subparagraphs (3), (4) and (5) of Paragraph A of this Instruction, then, and only then, should you find in favor of the plaintiff and sign verdict

number I. If the plaintiff fails to prove the matters set forth in any of said sub-paragraphs (3), (4) and (5) above, by a preponderance of the evidence in this case, or if the evidence in this case as to the matters set forth in said sub-paragraphs (3), (4) and (5) is equally divided, you should find against the plaintiff on the issues set forth in this case, and you should find for the defendant, Gordon, and sign verdict number II.

(II) The defendant, Gordon, claims that his agreement with the plaintiff, Hager, in the latter part of 1944 was as follows, to-wit:

(a) That he, Gordon, was to build the boat and barge afterwards known as "Elaine G";

(b) That said Hager would operate said boat and barge, "Elaine G", and apply the earnings thereof to the repayment of the cost of building, equipping and operating said boat and barge;

(c) That when the earnings from said boat and barge paid off the cost of building, equipping and operating said boat and barge, he, Gordon, would give him, *Hager, a title to said boat and barge;*

(d) That the earnings from said "Elaine G" boat and barge had not, on or before the 20th day of April, 1946, paid off the cost of building, equipping and operating said boat and barge;

(e) *That he, Gordon, never executed any title transferring said "Elaine G" boat and barge to said Hager, or anyone else.*

You are instructed that you should consider the above claims of the defendant, Gordon, at the same time that you consider the claims of the

plaintiff, Hager, mentioned in instruction Number I, and give effect to such claims as you believe to be true.

(III) (a) You are instructed that this is an action in claim and delivery, which can be maintained by the plaintiff, Hager, *only in case he was the owner of the "Elaine G" boat and barge upon the 20th day of April, 1946, and thereafter.* If the owner of said boat and barge, upon the 20th day of April, 1946, was the defendant, Gordon, then the plaintiff cannot prevail in this action, *and this is true without regard to whether or not the earnings of said "Elaine G" boat and barge had paid off the cost of building, equipping and operating said boat and barge.*

(b) You are further instructed that unless the plaintiff, Hager, proves by a preponderance of the evidence in this case that he, Hager, and not the defendant, Gordon, *was the owner of said "Elaine G" boat and barge upon the 20th day of April, 9146, you should find against the plaintiff, Hager, and in favor of the defendant, Gordon.*

(c) You are instructed that if you believe from the evidence defendant, Gordon, furnished all the money for the building, equipping and (19) operating (except salary for plaintiff, Hager) of the boat and barge "Elaine G" prior to April 20, 1946, *the title and ownership of said boat and barge would have been in him, Gordon, unless the plaintiff has proved by a preponderance of the evidence* in this case that he and the defendant agreed, as mentioned in sub-paragraph (4) of Paragraph A of Instruction Number I, to-wit: *That at all times before the earnings of said*

"Elaine G" boat and barge paid off the cost of building, equipping and operating said boat and barge, the said Hager was to be the owner of said boat and barge." (Emphasis ours.)

You will also note that attached to the instructions as set out commencing on page 10 are two forms of verdict. Verdict number I reads as follows:

"We, the jury, duly empaneled and sworn to try the above-entitled case, do, from the evidence and the law of the case, find in favor of the plaintiff, Hager, and against the defendant, Gordon, and that the plaintiff, Hager, was, upon the 20th day of April, 1946, and at all times thereafter, the owner of and entitled to the possession of that certain stern wheel power boat named 'Elaine G'. *and that certain power driven barge named 'Elaine G'".* (Emphasis ours.)

"We further find that the value of said boat and barge, upon the 20th day of April, 1946, was the sum of $55,000.00, and that the plaintiff has suffered damages in the sum of $10,000.00 by the taking and withholding of said boat and barge by the defendant.

"Done at Fairbanks, Alaska, this ..... day of January, 1948.

.....

Foreman. (16)"

There was also attached to the instructions verdict number 2, which were the sole and only verdicts submitted to the jury. Verdict number 2 is as follows:

"We, the jury, duly empaneled and sworn to try the above-entitled cause, do, from the evidence

and the law of the case, find in favor of the defendant, Gordon, and against the plaintiff, Hager, and that upon the 20th day of April, 1946, and thereafter, the defendant, Gordon, was the owner of and entitled to the possession of that certain stern wheel boat named 'Elaine G', *and that certain power driven barge named 'Elaine G'.*

"Done at Fairbanks, Alaska, this 28th day of January, 1948." (Emphasis ours.)

The jury, after a long and tedious deliberation signed and returned verdict number 2. It is appellant's contention that an overwhelming burden was placed on the plaintiff by the erroneous instructions above set forth and in truth and in fact amounted to an instruction to render a judgment for the defendant. In the first place, confining the plaintiff to the 20th day of April, 1946, was an error as the case was tried upon the theory of claim and delivery upon a suit filed long after that time and the pleading upon which the case was tried, the plaintiff's second amended complaint, was filed and entered on October 1, 1947, and the answer thereto was filed October 21, 1947, and the reply was filed December 29, 1947. The second cause of action was based upon the use of the plaintiff's boat for may, June, July, August, September, and October, of 1946, and the instruction was so confusing that the jury could not possibly know what to do in the matter and the forms of verdict submitted to the jury were two in number, one of which was to be used in case the jury found for the defendant. The other compelled the jury to do a lot of things before they could possibly find in favor of the plaintiff on

his first cause of action, which was solely for the return of his boat, if a return thereof could be had, and if a return thereof could not be had, then in the alternative, for a judgment against the defendant for the reasonable market value thereof in the sum of $25,000.00.

Now, it is quite apparent that the judge would not permit the jury to return a verdict for the return of the boat and barge or a judgment in favor of the plaintiff in the sum of $25,000.00 as prayed for, but he tacked on to this verdict a mandatory finding which reads:

> "We further find that the value of said boat and barge, upon the 20th day of April, 1946, was the sum of $55,000.00, and that the plaintiff has suffered damages in the sum of $10,000.00 by the taking and withholding of said boat and barge by the defendant."
>
> (See T.R. p. 18.)

It is self-apparent that the jury had to find the value of the property to be $55,000.00 against the plaintiff's allegation and prayed for $25,000.00, (see T.R. p. 4), and placed the jury in such a position that it could not find for the plaintiff at all without finding the value of the property to be $55,000.00 and assessing damages against the defendant for $10,000.00, although the first cause of action asks solely for the return of the property or its value in lieu thereof in the sum of $25,000.00 and nowhere in the pleading did the plaintiff ask for $55,000.00 as the reasonable market value of the property. Then he left the jury

with only one thing to do on behalf of the plaintiff and that was to render a judgment not based upon the pleadings as to the value of the property and required it to render a judgment for $10,000.00 damages or in the alternative to render judgment for the defendant. This puts such an unreasonable burden upon the plaintiff that the jury rather than to sign verdict number 1, apparently signed verdict number 2, doing an extreme and violent injustice to the plaintiff.

This amended complaint consisted of two separate and distinct causes of action and the jury should have been permitted to render judgment for the plaintiff on the first cause of action, if it cared to, and to have rendered judgment on the second cause of action for either the plaintiff or the defendant as it saw fit to do from the pleadings and the evidence, but instead of that the jury either had to find to the utmost for the plaintiff and fix a value of the property at $55,000.00 instead of $25,000.00 as alleged in the complaint and as prayed for and to render a judgment for $10,000.00 damages against the defendant or they could do nothing whatsoever for the plaintiff. There was no alternative and no proper verdicts submitted to the jury and the instructions as above set out are so biased and prejudiced against the plaintiff and so completely against all of the evidence that no jury could be expected to read the instructions as given and render a judgment for the plaintiff. In truth and in fact, these instructions put the jury on the spot where they could only do one thing and that was render judgment for the defendant.

Please note instruction III, page 13, T.R., these words:

> "If the owner of said boat and barge, upon the 20th day of April, 1946, was the defendant, Gordon, then the plaintiff cannot prevail in this action, *and this is true without regard to whether or not the earnings of said 'Elaine G' boat and barge had paid off the cost of building, equipping and operating said boat and barge."* (Emphasis ours.)

Then this was followed with subdivision (b) of the instructions, which is as follows:

> "(b) You are further instructed that unless the Plaintiff, Hager, proves by a preponderance of the evidence in this case that he, Hager, and not the Defendant, Gordon, was the owner of said 'Elaine G' boat and barge upon the 20th day of April, 1946, (10) you should find against the Plaintiff, Hager, and in favor of the defendant, Gordon."

To support our contention that this instruction was error, we call your attention to the evidence in the case set forth in the Bill of Exceptions commencing on p. 55, T.R. First, the defendant identified two exhibits that were attached by a stapler. One was the manifest of the freight hauled by the plaintiff, Hager, with the "Elaine G" boat and barge. The other were the manifests of freight hauled by the defendant with the "Bonnie G" boat and barge. It should be borne in mind that the defendant himself had the custody of these manifests, picked them out and identified

them himself and then testified that in addition to the amount shown on the manifests that he received $308.23 paid by the Alaskan Railroad for the towing of a scow by the "Elaine G"; that the "Elaine G" was paid $50.00 and $40.00 for standby time and that the exhibits in the box held by him included all of the cost of construction and the operation of the "Elaine G," the two scows and the repairing or rebuilding of the "Bonnie G" and included the cost of operating the equipment from the beginning to the time it was pulled out on the bank of the Chena in the fall after the summer's operation.

Then, Warren L. Hager testified that his mother was the sister of Mr. Gordon, the defendant herein; that he had worked with "Doc" Gordon a long time before he enlisted in the army; that he enlisted in 1942 in December; that while he was serving in the army he was stationed at Fairbanks and there was an awful freighting boom on the river and weren't enough boats to handle all the freight there was to haul. He was interested in that line of business. He thought he would like to get into it. He had an agreement worked out with a fellow whereby they were going to get what money they could and build a boat and put it down on the river for freighting down below. He talked it over with Mr. Goron in the winter-time and talked to Gordon several times in the winter of 1944 and the spring of 1945 at the Nordale Hotel, N. C. Co., Cottage Bar, and wherever they chanced to meet; sometimes ten times a day for a week, then maybe two or three times another week depending on when he

could get to town or how busy Mr. Gordon was; that was the main topic of conversation.

He then testified:

> "I said to 'Doc,' 'I would like to go freighting and I have a deal on with another guy to build a boat. We are in the army. We may not get to operate it, but there is one man that we think could and he is working for you and we would like to have him work for us if you could spare him and that boat we are building could operate along with you down there on the Yukon River.' " (P. 60, T.R.)

Then he was asked:

> "What did 'Doc' say to that?" "Doc" thought it was a good idea. He said it was fine, to get this boat business, but he said: "Come in with me. I will take you and we will go to the bank and see if we can get the money, and I will go outside and get machinery and we will build the boat here. You can build it while I am out getting machinery and then you will be in with me down there." He liked the way I operated—the way I worked. He said: "I think you will be good on it. *You will have a boat and a barge,* and *I will have a boat and barge,* and after the money is all paid—we are going to make a lot of money." He said, "I am going to sit back and take it easy and you can take both boats. *What money you make with your boat and barge will go into paying it off, and as soon as it is paid off, it becomes yours, free and clear.*" (T.R., p. 61; emphasis ours.)

He also testified that they spent several days together in the Nordale Hotel drawing plans, conferring with Charlie Smelzer, got everybody's ideas together; wanted it as soon as it possibly could be built, whatever the money could buy lumber enough for; we worked it out together. The boat was built 46 feet long. We agreed on power barges to operate with the boats. We agreed on a boat and barge for myself and he said as long as we were building that, "I need another barge." He had a small barge but he said, "I need another one. *You can build one for me the same size you are going to have.*" That will make two barges and one boat we were to build. (See T.R., p. 62; emphasis ours.)

Thereafter he was asked:

> "Now, after you did that, what did you do in the way of raising money to construct these boats? We went to the bank.
>
> "What bank did you go to? Bank of Fairbanks.
>
> "Who did you talk to there? Philip Johnson.
>
> "Was he an officer of the bank at the time? He was."

Philip Johnson, "Doc", and himself were present. The arrangements were made at the little private desk of Philip Johnson at the bank. "Doc" outlined all the freighting there was to be done on the river. He had army verifications. It was common knowledge, they had Army Transportation Officers here organizing people to build boats, to help the government haul that freight. They needed it. The only way they

could get it was by boat. Mr. Gordon made arrangements to mortgage the "Bonnie G" and I believe his little barge that he had then, *and a mortgage on the boats and barges that were to be built.*

After the arrangements were made "Doc" went outside. He made arrangements for me to draw on the money to start the building. He ordered the lumber. "Doc" Gordon left for the outside to get machinery. Machinery was very hard to get then. You had to go after it personally, outside.

"And 'Doc' went out?" " 'Doc' went outside."

That he believed was in November.

The witness then testified that he got a place to build a boat; leased the children's playground from the city. Mrs. Sylvia Ringstad was the chairman of the playground committee. The lease was reduced to writing.

They took over that section down there and started to work. Then he testified in answer to this question:

> "What did you do about a place to work? I went to Morris Knudsen, bought two quonset huts for $800.00 apiece, bought a Ford pick-up to run around in, hired a cat, moved the quonset hut down on—cleared the snow and debris off and set the quonset up for a winter workshop and started to work." (See T.R. p. 64.)

He testified that Mr. Gordon returned in the spring; that the boats had been built and put in the water. They agreed that the cost of the work done above the bridge and the material furnished should be charged

one-third to "Doc" and two-thirds to Hager as Hager was building himself a boat named "Elaine G" and a power barge to operate therewith and that "Doc" was building the same size and kind of a power barge to operate with his boat; that this agreement as to cost allocation was made before the boats were finished; that Mr. Gordon said that we would have to go on an estimation as it was too difficult to figure out the exact cost of my boat and barge as compared with the cost of his barge and that it would be fair to charge one-third of the cost to him and two-thirds of it to the plaintiff, Hager; that each of the boats, the "Bonnie G" and the "Elaine G", were powered by new Gray-Diesel engines and his barge had a new Gray-Diesel engine in it and "Doc's" barge was powered by the transfer of the engine from the "Bonnie G" to the barge. He further testified that when the boat "Elaine G" and the two barges were moved below the river bridge to the spot where the "Bonnie G" was docked, that the work on each of the boats including the rebuilding of the "Bonnie G" would be charged against the particular man for whom the work and material was furnished and that the help used on the boats and the supplies used, including oil, food, and everything as to cost of operation of the outfits would be charged against each boat and everything used on the "Elaine G", his boat, would be paid out of the earnings of that boat and whoever he hired to work on it would be paid from the earnings and this agreement took effect from the time they passed under the bridge at Fairbanks.

That "Doc" rebuilt the pilot house on his boat below the bridge and the witness, Hager, put the pilot house on the "Elaine G" below the bridge; that the old engine was taken out of the "Bonnie G" and placed in "Doc's" power barge. New tail bearings were laid, keel was laid for bearings, the new engine was put in, all housed in; the galley was changed around; just a general remodeling; a paddle wheel was changed; new equipment all went into the "Bonnie G"; he changed the drive from an automobile rear-end drive to a sprocket drive, the two machineries identical with the exception of a little variation in size. The "Bonnie G" was a little shorter than the "Elaine G", but powered equally as high. They drew about the same amount of water.

The cost of rebuilding the "Bonnie G" was to be charged to "Doc". The additional work on my boat and barge which was done below the bridge was kept separately and charged to me.

After the equity suit was dismissed, the exhibits were kept for quite a long time in the Court Clerk's office. During that time the witness employed a man by the name of Thomas B. Wright, an experienced bookkeeper, to go all over the exhibits and figure out the cost of the "Elaine G" and barge based upon all of the receipts and bills, including the cancelled checks for the cost of building and operating the whole enterprise. He then identified the statement made by the bookkeeper. He worked with Mr. Thomas B. Wright in making out the statement in the Court Clerk's office. He was familiar with the purchasing of all of

the material and the using of the labor and that the statements on the yellow sheets are correct. They show the cost of his equipment separate from the cost of "Doc's" equipment.

Capitulation sheet was prepared by Thomas B. Wright showing all of the figures up to the time they quit operating that fall; that was marked Identification No. 4. All of the figures are of Thomas B. Wright and they are correct.

The capitulation shows the cost of each of the barges, each fellow's equipment, the cost of operating the boat and barge and the proceeds derived from the hauling of each boat and barge. The capitaulation was made from all of the exhibits furnished by "Doc" Gordon and all cancelled checks, receipts and bills were put in it.

These exhibits were in Mr. Hall's office at the time. All debts at the bank were paid by government checks. There were two checks from the government, one for $44,297.91, the other for $33,095.52. They were turned over to the Bank of Fairbanks to liquidate all indebtedness against the boats. Some part of it was to go to "Doc" Gordon's personal account. They were received for hauling of the two boats. "Doc" received other checks as follows: One for $308.23; one for $50.00; one for $80.00. They were all used by the bank in cleaning up the indebtedness. The $308.23 was earned with the witness' boat; $50.00 was earned with his boat, and half of the stand-by time of $80.00 was earned with his boat. That the two identifications

made up by Mr. Wright show every charge and credit in connection with building, maintaining, operating and even beaching of boats and putting them away for the winter. Each item was taken from the exhibit that "Doc" Gordon furnished here, everyone without an exception. The building, operation and beaching of his boat and barge amounted to a little over $50,000.00, a few cents over. He earned more than $52,000.00 with his boat and barge that year, which all went to the bank to repay the cost. The manifests from the government show that the earnings of the "Elaine G" and barge amounted to $52,504.75; that he hauled each and every particle of that freight and earned that money, and the government paid therefor. That the earnings of his boat and barge exceeded the cost of construction, operation, maintenance and beaching of it that fall, to the extent of nearly $2,000.00. That it cost much more for "Doc" to operate his boat and barge due to the fact that the witness had a crew of three on his boat the whole season, and "Doc" had as high as seven, all paid employees, and each furnished food for their employees; it cost more to feed seven than it did three, and "Doc" got on more sand bars; that the proceeds from the earnings of his boat overpaid the cost of building, construction, operation and beaching nearly $2,000.00.

That when the season was over ways were built down by the C.A.A. tower to pull them out of the water, away from the ice, for the winter. We towed them out of the water. The witness saw to it that his boat and barge were pulled out and that "Doc's"

boat and barge were pulled out, and allowed half of the cost of pulling them out and charged that into the cost of operation of his boat. He lived on the boat thereafter for sometime, then on account of fire insurance, he had to get off. No one was permitted to live on the boats in the winter. (See pages 65, 66, 67, 68, 69, 70, 71, 72, 73, and 74 of T.R.)

He then testified about the quonset hut that was purchased still being in "Doc's" possession and stated that there never was any dispute about the ownership of his boat and barge until about two days after he had the boats all pulled out of the water and put away for winter. This happened when he asked "Doc" when he could get the bookkeeper to get together and have a settlement and divide the profits if there were any and divide the equipment as per the agreement and testified that "Doc" put him off, said the bookkeeper was so busy he couldn't get around to it, promised to get around to it in a few days. This was repeated at least fifteen or twenty times right in Fairbanks and then he finally filed suit in equity which was later dismissed, and the next summer Gordon took both the boats and hauled freight with them. Then on cross-examination concerning the agreement with "Doc" he testified that he signed the notes at the bank; that the notes were later paid off; that the cost of the insurance was shown in the sheets; that the size of the boat and barges were agreed upon; that two $3,000.00 notes were made at the bank; that he signed them; that he sold one of the quonset huts for $800.00 and put

the money back in the bank; that the way bills from his boat and barge amounted to $52,500.00 and some dollars; that he took the actual cost of construction from the bills. He figured the operating expenses on the river which included putting out in the water of the boat and barges and the taking them out, the food, the diesel oil, the fuel oil, everything that went into the cost of maintaining and operating the equipment. The wages to the bookkeeper were figured in; insurance was figured.

He testified then that his earnings were $52,504.00 and the cost of operation and construction, everything figured in, was around $50,000.00; that he had never been given a bill of sale for the boat; he had owned it always. There was no bill of sale; it was automatically his; he built it; he didn't know whether it was registered or not; it might have been registered in the name of the Gordon Transportation Co. That he drew no salary for operating the boats. He was transferred by the army to the boats and drew army clothes and medicine, including his pay. He got his board on his own boat and in restaurants.

Then on redirect examination he testified that Gordon had the Ford Pickup and was living in the quonset hut and that he doesn't claim either of them; they were both figured in the cost of construction of the "Elaine G" and the two barges; "Doc" has them and he never tried to get them; yet he figured two-thirds of the cost of them in the construction of his boat and barge.

Then on recross examination by Mr. Taylor, he testified that he was to build this boat, operate it, haul freight with it and when it had hauled enough to pay for it, it was just to be his clear; it was considered his boat all the time. The cost of building and operating it was to be paid off by the witness and it was up to the witness to run it with as little expense as possible so he could get it paid off quickly; that is why he used a small crew and freighted all he could to get it paid off while the freight was there to haul.

Thomas Wright was then called and identified, the identifications consisting of the capitulation and worksheets, which he said clearly disclosed all of the cost of construction, operation and beaching of the "Elaine G" and the barge operated therewith; identified the figures and papers which were introduced in evidence, which figures showed the cost of construction, operation and beaching to be $1,697.29, less than the receipts from the hauling by the "Elaine G" and barge. In other words, the earnings of the "Elaine G" and barge were $1,697.29 more than the cost of all of the construction, operation and beaching.

Then Gordon was called and testified in his own behalf. That he was the owner of the Gordon Transportation Co.; it was not a corporation and he had no partners. That Warren Hager was his nephew; that he had an agreement with Bud (the evidence all shows that Bud is the nickname of Warren L. Hager, the plaintiff herein) as the owner of the "Elaine G". See T.R. p. 86. That he had a contract with the United States Government for trade on the Yukon-

Tanana River; did for three or four years. That the contract and agreement that he had with Hager regarding the "Elaine G" and a certain power barge or scow was:

> "I was to build the boat, get a release from the Army for him to operate the boat; he would operate it until such a time that it had earned enough money to pay for its construction, its operation and all expenses. That was two boats was to be operated together, so as to save equipment and crew; help one another out when we got in trouble; and when that boat had earned enough—sufficient money to pay itself off, clear, I was all clear, then I would give him a title to the boat and he could go into business for himself, or go into partnership with me, any way he could see fit at that time." (See T.R. p. 87.)

He testified about the borrowing of the money from the Bank of Fairbanks to build the "Elaine G", the two power barges and to overhauling his boat and testified that he had approximately $2,000.00 of his own money when they started. He admitted on cross-examination that a mortgage was made to the bank in July of 1945 for $37,000.00 and that everything was cleared up at that time, but stated that he thought he borrowed altogether $40,000.00 to build the boat and barges and to rebuild the "Bonnie G". It totalled somewhere around $40,000.00. He borrowed some from individuals and admitted receiving back $77,800.00 plus the amount he received from the railroad company and the stand-by time, etc., and he further testified that he agreed with Hager that the

cost of construction of the boats and barges should be divided one-third to each of the boats. The barges were longer than the boats, but the boats had three decks, more material, practically as much lumber and cost in the construction of the boat as there was in each of the barges and that they agreed to separate the cost of construction three ways, one-third to each boat and barge. (See T.R. pp. 90, 91, 92.) That he borrowed $37,000.00 from the bank; that he borrowed $3,000.00 at one time and $2,000.00 from another party and several hundred from different parties, a little less than $6,000.00.

Then note his testimony of evasion commencing on page 93 and continuing over to page 100, T.R.

Then the defendant, Gordon, called as his witness Charles A. Smelzer. He testified that he was a carpenter, had worked for "Doc" Gordon for several years, lived in Fairbanks approximately eight or nine years; he knew "Doc" in 1944; he had been pilot and engineer on his boat, was on his boat when it was frozen in up the river. He then went to Seward and came to Fairbanks in the fall of 1944. They started work on the "Elaine G" and the two large barges. Mr. Hager paid the first wages the first month; paid it by check. Didn't remember the date they started, but worked until the 4th of July then went off down the river. Mr. Gordon had charge of the work. Hager was there. He gave the witness orders once in a while, how he wanted this or that fixed; that they both had the final say; both Gordon and Hager. The witness

stayed on the boat, the "Elaine G"; he worked with Hager. Hager was supposed to be the head guy, master of the boat. On cross-examination he testified that he didn't know where the money came from. He didn't know how it was raised. He said they were building two barges and a big boat. Both men issued orders to them.

He understood that "Doc" and "Bud" had some kind of an agreement as to the ownership of the boats; that was what they said themselves. He had heard "Doc" talk about it. He heard "Doc" say in the first place Bud and him had an agreement about building a boat. "Doc" says:

> "I will build you a boat and give it to you after it is paid for provided you call up with me and help me."

He understood the "Elaine G" and one barge was to be operated by "Bud" and the witness. When it was paid for and clear, it was to be "Bud's" property providing that everything was carried out.

He testified that he helped build the "Bonnie G". He remembers hauling the asphalt up the river on the "Elaine G" and barge on a trip from Galena up to Nenana. (You will note this represents the manifest that "Doc" Gordon later denied after he had first identified it as being one of the manifests hauled by the "Elaine G" and barge operated by "Bud" Hager, the appellant here.)

Therefore, the Court erred in giving the instructions that he did and in submitting the two only

forms of verdict above set forth and, therefore, prevented this plaintiff from having a fair trial and by so doing caused an unconscionable verdict to be rendered, which was directly contrary to all of the evidence of both the plaintiff and the defendant.

SECOND POINT RELIED UPON FOR REVERSAL.

For the purpose of clarity and convenience of the Court and attorneys, we would like to present as our second point for reversal the overruling by the Court of the plaintiff's motion for an instructed verdict at the close of the evidence.

While there is much haggling back and forth in the testimony, there is no dispute about what the agreement was between the plaintiff and the defendant. It all amounts to this, that Hager, the plaintiff herein, was about to go into a deal with another man to build a boat and barge to put into government service for the hauling of freight on the lower Tanana and Yukon Rivers and that he went to his uncle, Clyde E. Gordon, who bears the nickname of "Doc" for the loan of an employee of "Doc" to-wit, Charlie Smelzer, for the purpose of building a boat and barge and that Hager was an experienced man on the river and so was "Doc" and "Doc" liked the way Hager worked and at "Doc's" instance and request Hager gave up his arrangements with the other man and went into the deal with his Uncle "Doc". Everyone agrees that the cost of construction of the "Elaine G" and the two power barges was to be charged one-third against Doc and two-thirds against Hager. They all agree

that Hager was building himself a boat known as the "Elaine G" and a power barge and that Hager was building a power barge for "Doc". Up to this point there is no controversy. The evidence also is identical that the money was to be borrowed from the Bank of Fairbanks, all but $2,000.00 "Doc" had and "Doc" was going outside to Seattle, Washington, to buy some equipment and "Bud" or the plaintiff, Warren L. Hager, was to start the construction immediately. The evidence is undisputed that the bank did furnish the money up to $37,000.00. "Doc" claims that he borrowed $2,000.00 and $3,000.00 more from other persons and also borrowed a few $100.00 advancements and that he had $2,000.00. All of this money could not possibly have exceeded $44,000.00, basing it upon the testimony of both the plaintiff and the defendant.

The testimony shows conclusively that the defendant, "Doc" Gordon, picked out of his records the manifests for the freight hauled and the money earned by the "Elaine G" and the barge of the plaintiff, Warren L. Hager, and that he built this boat and barge and operated it all the time, signed the manifests as the master of the boat and earned $52,504.75 for hauling for the government, which was all paid to the bank and also earned $308.23 from the railroad and $50.00 for towing a barge and $40.00, one-half of the $80.00 stand-by time, making admitted earnings of the plaintiff with his boat and barge to the extent of $52,802.75, all of which went to the bank to "Doc" Gordon's account or for the special purpose of repaying the cost of building and operating the equip-

ment. The plaintiff tried to prove and the defendant objected and the Court sustained the objection as to the exact earnings of the "Bonnie G" and barge. This would have completely clarified the issue if it had been permitted. However, this is assigned as error and will be considered elsewhere. It was testified to by the plaintiff and by the bookkeeper, Thomas B. Wright, that he audited all of the costs of construction, operation and beaching of the boats from the exhibits furnished by "Doc" Gordon himself, which were in the custody and control of the Court Clerk at Fairbanks and that the cost of construction, operation, beaching, insurance and everything that could possibly be charged to the plaintiff's boat was overpaid by its earnings to the extent of $1,697.29. Then at the close of all of the evidence, Mr. Hurley, acting on behalf of the plaintiff, moved the Court to instruct the jury to return a verdict in favor of the plaintiff and against the defendant as prayed for in the complaint for the reason there was no evidence on behalf of the defendant contradicting the evidence of the plaintiff as to the contract and as to the money earned by the "Elaine G" and barge and no evidence contradicting the cost of construction and the cost of operation. The evidence clearly showed that there was sixteen hundred and some odd dollars earned by the plaintiff, more than the cost of construction and operation of the "Elaine G" and barge built and owned by the plaintiff. The Court overruled the motion and an exception was allowed to plaintiff. (See T.R. p. 106.) Undoubtedly, the Court should have sustained this

motion. There was not a single place in the defendant's evidence where he contradicted the agreement between the plaintiff and himself and the only contradiction at all was his reversal of his former testimony as to one certain manifest and then he did not directly deny receiving the money thereon, but admitted receiving $77,791.66 and in backing up on his former testimony in positively identifying the manifests showing the freight hauled by the plaintiff, he would not definitely deny the correctness of the particular manifest, but only dodged it by evasive testimony under pressure by his attorney and the manifest that he was doubtful of was stapled in a bunch of other manifests, all of which he had previously picked out of his files and positively identified as being the manifests of the freight hauled by the plaintiff and the amounts shown thereon as being within a few cents of the correct amount of money that he received payment of through the Bank of Fairbanks, which payment was made by the United States Government and the plaintiff positively identified this manifest and testified unequivocally about hauling the particular load and this was verified by Charlie Smelzer, who was a defendant's witness. It is our contention that when a plaintiff has proven his case and the defendant introduced no evidence to disprove any part thereof and especially in this instance where the defense corroborated practically all of the plaintiff's testimony, then the plaintiff was entitled to a judgment as prayed for in his complaint.

Could it be said by any fair-minded Court or jury that such an agreement could be arrived at as was unquestionably the case here; that the plaintiff went ahead and carried out every particle of his agreement, earned a sufficient sum with his boat and barge to pay off all of the cost of construction, operation and beaching, received no pay whatsoever for his services, worked often 24 hours per day and then when everything was over and the boat and barges, including the repair and rebuilding of "Doc" Gordon's "Bonnie G" had been fully paid for; that $77,791.66 had been deposited to the defendant's account; when he himself testified that he had $2,000.00 and borrowed something like $40,000.00 (See T.R. p. 91) showing an expenditure of $42,000.00, according to his own testimony and then the evidence shows conclusively that the plaintiff's earnings from his boat and barge amount to $52,802.75 and the defendant admits getting every cent of this money in his own account at the bank and the undisputed evidence of the plaintiff that all of the indebtedness was completely paid off, then could it be said that any Court of justice would permit the defendant to just arbitrarily take the boat from the place it was beached and keep it and operate it on the river and give the plaintiff nothing? Such a conclusion could only be conceived in the mind of an unjust person. No person whether it be Court or jury could possibly justify such a judgment as was rendered here and, therefore, it became the duty of the trial Court to sustain the plaintiff's motion to instruct the jury to return a verdict for the plaintiff as prayed

for. We respectfully appeal to the conscience of this Court to reverse this judgment and render the judgment that should have been rendered sustaining this motion for an instructed verdict and do justice between these persons.

We will now attempt to set forth as near as we can the contention of the witnesses as to what the contract between the plaitniff, Warren L. "Bud" Hager, and the defendant, Clyde E. "Doc" Gordon really was. Hager testified to his version of the contract which is as follows:

Doc thought it was a good idea. He said it was fine, to get this boat business, but he said, "Come in with me. I will take you and we will go to the bank and see if we can get the money, and I will go outside and get machinery and we will build the boat here. You can build it while I am out getting machinery, and then you will be in with me down there." He liked the way I operated—the way I worked. He said: "I think you will be good on it. You will have a boat and a barge, and I will have a boat and a barge, and after this money is all paid—'we was going to make a lot of money', he said, 'I am going to sit back and take it easy and you can take both boats. What money you make with your boat and barge will go into paying it off, and as soon as it is paid off, it becomes yours, free and clear.' " (T.R. p. 61.)

Then the defendant called a witness by the name of Charlie Smelzer, who was an employee of the defendant, Clyde E. Gordon, and he gave his version of what

the contract was between the plaintiff and the defendant, which was about as follows:

He understood that "Doc" and "Bud" had some kind of an agreement as to the ownership of the boats; that was what they said themselves. He had heard "Doc" talk about it. He heard "Doc" say in the first place "Bud" and him had an agreement about building a boat. "Doc" says: "I will build you a boat and give it to you after it is paid for providing you call up with me and help me." He understood the "Elaine G" and one barge was to be operated by "Bud" and when it was paid for and was clear it was to be "Bud's" property providing that everything was carried out. (T.R. p. 105.)

Then the only other witness who attempted to testify as to what the contract was was "Doc" Gordon, the defendant, and he testified:

I was to build the boat, get a release from the army for him to operate the boat. He would operate it until such a time that it had earned enough money to pay for its construction, its operation and all expenses; both boats to be operated together so as to save equipment and crew; help one another out when we got in trouble and when that boat had earned enough—sufficient money to pay itself off clear, I was all clear, then I would give him a title to the boat and he could go into business for himself or go into partnership with me, any way he could see fit at that time.

In analyzing the testimony of the plaintiff and the testimony of the defendant and the defendant's wit-

ness, Smelzer, and this being the sole and only testimony affecting the contract, there is not a scintilla of difference in the facts. They all amount to the same thing and in truth and in fact no one has denied a single thing that was testified to by the plaintiff, Warren L. "Bud" Hager. He testified that he and another man had planned to build a boat and to raise what money they could and borrow all they could and build as big a boat as they could for the money they could raise; that he told his Uncle "Doc" about their plans. Now this must be true because it remains undenied even though the defendant, "Doc" Gordon, testified fully and so did his witness, Smelzer, and no one contradicted a single word of that. Then the plaintiff testified that the defendant, Clyde E. "Doc" Gordon suggested that he come in with the defendant; that they would go to the bank and borrow the money; that "Doc" had $2,000.00 and they would borrow the rest of the money at the bank. "Doc" would go outside and buy machinery and Warren L. Hager would go ahead and build the boats. He further testified that they agreed to this and went to the bank together, borrowed the money together, Hager signed the notes, "Doc" went outside to buy machinery, Hager leased a site to build the boats, the lumber had been ordered by "Doc", the plaintiff bought two quonset huts and a pick-up automobile, drew $2,000.00 out of the bank to pay for them, set the quonset hut on the ground, started the work. sold the other quonset hut for $800.00, put the money back in the bank, worked constantly from then until the boats and

barges were finished. This stands undenied by anyone and according to the rules of evidence being reasonable, straight-forward, clean and undenied evidence, it amounts to an admission. Especially is this true when practically all of it is corroborated by the defendant or the defendant's witness, Smelzer.

Gordon had a perfect right and a world of opportunity to introduce evidence showing what part of the $77,791.66 that he admitted getting, was actually earned by him with his boat and barge, and this honorable Court will remember that the plaintiff tried to prove exactly what each party with their boat and barge earned and collected and the defendant objected to making that proof and the Court refused to allow the introduction of the manifests of the "Bonnie G" the defendant's boat, even though they had been separated by the defendant himself and stapled together and if we were favored with the manifests of the loads hauled by the "Bonnie G" and the amount of money received from each of its manifests and had the amount admittedly earned by the "Elaine G" to the extent of $52,802.75, then you would have the amount of $77,791.66 and the greatest figure that "Doc" Gordon ever placed on the cost of the construction of the boats, barges, etc., is shown by his testimony on page 91, T.R., as follows:

He thinks he borrowed altogether $40,000.00 to build the boat and barges and to rebuild the "Bonnie G". It totalled somewhere around $40,000.00, he had borrowed from all over and from individuals in all. The undisputed evidence also shows that he had approxi-

mately $2,000.00 of his own. Now putting those together would make a total cost according to "Doc" Gordon's testimony of $42,000.00. However, the plaintiff testified much more favorably and said that it cost a few dollars over $50,000.00 to build, equip, operate and dry-dock his boat and barge and that allowing the defendant all of those figures, he overpaid all of the cost of building, equipping, operating and dry-docking of his boat and barge to the extent of $1,697.29. It should be borne in mind that "Doc" Gordon had possession of all of the receipted bills, the cancelled checks, the bank accounts, the manifests and a complete audit of these things could have been done and that the only time that the plaintiff had an opportunity to audit these matters was during the period of time that they were exhibits in the equity case that was dismissed and while they were held by the Court Clerk in his office in Fairbanks and a person who made the audit at the time to-wit, Thomas B. Wright, was hired to make the audit and testified to the correctness of the audit and that every charge and credit were properly considered. The defendant Gordon must have known that this audit was correct or he would have introduced these exhibits in this case and would have had a perfect audit made to disprove the facts alleged by the plaintiff.

Now, therefore, there being no controversy of any material variance as to the contract, then the defendant had no right to take the plaintiff's boat and run off down the river and keep it and it was the duty of the Court when this matter was called to his attention

by a motion of the plaintiff at the close of all of the evidence to instruct the jury to return a verdict for the plaintiff. Then, and in that event, it was error for the Court not to have done so.

Council for defendant may argue that the plaintiff was not entitled to recover the $10,000.00 damage item set forth in his second cause of action. Again it must be remembered that the plaintiff testified he was damaged to that extent and the defendant, though on the stand, and with ample opportunity to deny that, did not deny it in a single word and the evidence of the plaintiff as to the right to recover the $10,000.00 damage for the wrongful taking of the boat was clear, concise, clean and convincing. Standing undenied after opportunity having been presented to the defense to deny the same, it became an admitted fact. Therefore, it is our contention that an instructed verdict should have been rendered and in support of this position, we cite the following cases, to-wit:

In the case of *Robinson v. Denver City Tramway Co.,* 164 Fed. 174. The Eighth Circuit Court of Appeals in passing on a similar question found:

> "4 Trial—Question for Court or Jury—Direction of Verdict. When the evidence is undisputed, or is so clearly preponderant that the court, in the exercise of a sound judicial discretion, could give effect to but one verdict, the case may, and should, be withdrawn from the jury, and their verdict directed. (Syllabus by the Court.)"

This rule was also followed by the same Court in *Bell v. Carter,* 164 Fed. 417, as follows:

"1 Trial (141*)—Question For Court Or Jury—Direction Of Verdict. Whilst it is true that a substantial conflict in the evidence must be determined by the jury as a question of fact, it is also true that when the evidence is undisputed, or is so clearly preponderant that it reasonably admits of but one conclusion, the proper disposition of the case upon the evidence becomes a question of law, to be determined by the court. (Ed. Note.—For other cases, see Trial, Cent. Dig. 336; Dec. Dig. 141.*)"

Judge Sanborn again affirmed this statement of the law in the case of *Patillo et al. v. Allen-West Commission Co.,* 131 Fed. 680. The 4th Syl. reads:

"4. Trial—Court May Withdraw Question of Fact From Jury. Where the evidence upon a question of fact is so clearly preponderant, or of such a conclusive character, that the court would be bound, in the exercise of a sound judicial discretion, to set aside a finding in opposition to it, it is its duty to withdraw the question from the jury and direct their finding. (Syllabus by the Court.)"

The Supreme Court of Iowa in passing on this question followed the general rule laid down in the above cited cases, and in the more recent case of *Gregg v. Middle States Utilities Co. of Delaware,* 239 N.W. 66:

"(9, 10) To hold otherwise would be contrary to the rule so well stated by Justice Hamilton in Baker v. General American Life Ins. Co., 222 Iowa 184, 188, 268 N.W. 556, 558: 'But when the evidence all points in one direction, is not in

material conflict on the issues involved, and there are no circumstances which tend to impair or impeach the same, and is not susceptible of inherent weaknesses, improbabilities, and incongruities, which in and of themselves naturally arise to contradict or impeach the weight and credibility of the utterances of the witnesses, then it can most certainly be said as a matter of law that the record presents a case about which the minds of reasonable men cannot differ, and the court is, under such circumstances, warranted in directing a verdict, and there is no sound principle standing in the way of such action on the part of the court.' And by Justice DeGraff in Kern v. Kiefer, 204 Iowa 490, 492, 215 N.W. 607, 608: 'A verdict should be directed: (1) Where but one reasonable conclusion can be drawn from the proof adduced. (2) Where the questions of fact are clearly established by unconflicting evidence. (3) Where there is no substantial evidence to overcome a prima facie case. (4) Where by giving the opposite party the benefit of the most favorable view of the evidence, the verdict against him is demanded.'

The judgment is therefore affirmed.''

It seems to us that the rule set forth in American Jurisprudence in Volume 53 on page 291, is the correct and recognized rule, and from this we quote, as follows:

''* * * but the more generally approved rule is that it is not only permissible, but proper, for a trial court to direct a verdict upon unimpeached oral testimony given in behalf of the party having the burden of proof where such testimony is

direct, positive, and unequivocal, is not contradicted either directly or indirectly, and is not susceptible of inherent weakness, improbability, or incredibility.[20] This principle underlies the great majority of the cases cited in the preceding sections which recognize it to be not only within the power, but the duty, of the court to direct verdicts when undisputed facts support only one conclusion, or where a contrary verdict would have no support in the evidence."

"As has been said, credibility, either one way or the other, should make no difference in the operation of the fundamental principle which necessarily underlies the direction of verdicts in all cases. The question whether reasonable minds could arrive by reasoning processes at more than one opinion or conclusion is always a question for the trial judge."

"A jury has no greater or better right to act arbitrarily or unreasonably in forming a judgment or opinion as to whether or not a witness speaks the truth than it has to act unreasonably in arriving at any other opinion or conclusion."

The Seventh Circuit on July 24, 1940, in the case of *Foote Bros. Gear & Machine Corporation v. National Labor Relations Board. Independent Union of Gear Workers v. National Labor Relations Board et al.,* Nos. 7088, 7252, found in Volume 114 Fed. Second at page 611, have clearly and distinctly analyzed the same question presented here, and from the opinion over on page 622 we quote:

"(14-17) In reaching our conclusion we wish to make it clear that (a) a finding by an examiner

will be accepted when substantial (although contradicted) evidence supports it. (b) This rule (a) does not relieve us of a duty to examine the evidence and analyze and distinguish, when necessary between the factual and conclusion statements of a witness. (c) A statement which alone may afford substantial support for a fact finding may lose its weight entirely in the face of uncontradicted facts inconsistent with it. (d) Statements which are witness' mental deductions from physical facts weaken and sometimes lose their entire probative force in the face of undisputed facts which are irreconcilable with the deductions of said witness."

It is so apparent that where the testimony of the defendant, Clyde E. (Doc) Gordon, varies in the slightest from that of the plaintiff, Warren L. (Bud) Hager, that he is merely giving his conclusions, and are never a direct denial of a single thing that was testified to by the plaintiff.

The Supreme Court of South Dakota in a very long and well reasoned opinion by Justice Campbell completely covers this question, and we beg the indulgence of this Court in setting out at length from this intelligent analysis of this question found in the 223 N.W. at page 585, in the case of *Jerke v. Delmont State Bank,* We quote from the opinion commencing on page 590, as follows:

"(7) If reasonable minds could arrive at but one conclusion from the evidence, by applying their intellectual processes thereto, then the question as to whether the party having the burden

of proof has established the issuable facts in that particular case is a question to be decided by the judge, and not by the jury, and it is probably a mere matter of pharaseology and definition of terms in such a case whether we say, as a matter of language, that it then becomes a question of law of the court, or whether we say that, being a question of fact upon which reasonable minds could not differ, it is such a question of fact as will be decided by the judge, and not by the jury, though undoubtedly the latter phrasing is more accurate. The only objection thereto is that it seems to conflict with the words so often used in the books since Lord Coke first quoted, 'Ad quaestionem facti non respondent judices, ad quaestionem juris non respondent juratores,' namely, that 'questions of fact are for the jury.' Like most glittering generalities, this statement, to borrow the expression of Professor McBain, is 'weak and infirm of its own generality.' "

"Granting that it may have been true at a time when the function of jurors was to report the facts to the court of their own knowledge, it has not been true since the days, now more than 200 years, when it came to be the function of the jury to determine the facts by applying the reasoning processes of their minds to the evidence brought into court. Jurors do not determine all questions of ultimate fact, even in jury cases. They determine the existence or nonexistence of those facts, and those only, with reference to the existence of which the judgment of reasonable men might differ as a result of the application of their intellectual faculties to the evidence. If the proof offered by the party having the burden in support

of the existence of ultimate issuable facts is so meager that a reasonable mind could not therefrom arrive at the existence of such ultimate fact, there is nothing for the jury and the judge not only may, but should, direct a verdict against the party having the burden of proof. This is the ordinary case of directing a verdict against the party having the burden of proof, because of the insufficiency of the evidence, and with this no courts seem to have had any difficulty. On the other hand, it is just as true that, if the party having the burden of proof offers such evidence in proof of the existence of the ultimate issuable fact that a reasonable mind functioning thereon could not escape the inference, or conclusion, or opinion, or judgment that such fact existed, then here too is left no question for the jury, and the judge should direct a verdict in favor of the party having the burden of proof. Here, also, courts for the most part have had little difficulty. The general procedure is laid down, and the language used by the courts indicated, in 26 R. C. L. 1073."

"A few courts, very considerably in the minority, however, seem here to have been troubled with the matter of credibility of witnesses. The factor of credibility less frequently enters into the direction of a verdict against the party having the burden of proof, because in such case the credibility is usually assumed, or at least not brought into question. But the entry of the factor of credibility, either one way or the other, can make no difference in the operation of the fundamental principle which necessarily underlies the direction of verdicts in all cases. The question of whether reasonable minds could arrive by reason-

ing processes at more than one opinion or conclusion is always a question for the judge. The entry of the factor of credibility means simply the existence of one more item upon which the intellectual faculties are to operate. Of course, as the items to be reasoned upon increases in number, the likelihood of there being but one possible reasonable result mathematically diminished; but, when that situation does exist, it should not be affected by the fact that credibility is also involved."

"A jury has no greater or better right to act arbitrarily or unreasonably in forming a judgment or opinion as to whether or not a witness speaks the truth than it has to act unreasonably in arriving at any other opinion or conclusion. Forming an opinion as to credibility should be just as much a process of rationalization or reasoning from the data presented in the light of human experience as the formation of any other opinion or judgment in a court, and this has always been recognized by the great majority of the courts, and the proposition, subject to various qualifications, has been laid down in some such pharasing as that 'the positive testimony of a disinterested, uncontradicted witness cannot be arbitrarily or capriciously disregarded by the jury'. See a number of the older cases collected in a note in 81 Am. Dec. at page 268."

"Pursuing the matter somewhat further, we come to the precise question involved in the instant case, where the party having the burden of proof depends for establishing the existence of the ultimate fact, either in whole or in part, upon the

oral testimony of a witness who is interested in the transaction."

"The answer to this question does not state any rule of law, but merely announces a determination of logic or reason. The only rule of law involved is that which announces that the judge will determine the matter without the assistance of the jury, when reasonable minds applied to the evidence could properly come to but one conclusion. The legal principle is simple, and the real question in every case is not a question of law in any proper sense of the word, but is a question of logic, or reason, or judgment, however we may choose to phrase it, and it is in each case a question for the judge (or for the appellate court, as the case may be) and must remain such a question, regardless of the admitted fact that there is no external standard or yardstick whereby we may determine with mathematical precision what result reasonable minds must arrive at in the field of opinion or judgment, by the application of their intellectual faculties to certain given data. The standard of reasonableness is subjective, and it is the standard of the judge that must be used; probably in the final analysis the standard of the court of last resort in any given jurisdiction; but the nature of determination remains the same. When a court holds in any given case or upon any given facts, that the direction of a verdict is proper, it is not in any strict sense announcing a rule or doctrine of law, but is merely announcing its judgment or opinion as a matter of reason and logic that in that case and upon those facts reasonable minds could not differ as to the result to be reached."

"Our question further narrows to this then: "Ought a judge to say, as a matter of reason and judgment, that the mere fact that a witness is interested in the matter in controversy, in and of itself, without regard to other circumstances of the case, makes it reasonable to disbelieve or to fail to believe his testimony, in the light of general human experience? We do not believe that any court has gone so far as to lay down any such doctrine, or enunciate any such general principle, whether it be viewed as a matter of law or as a matter of logical rationalization. The sound view seems to us to be this: That each case must depend upon its own facts, and that the mere fact of interest in the controversy does not, in and of itself, and apart from other circumstances appearing in the case, render it a reasonable thing to disbelieve the testimony of a witness whom otherwise it would be unreasonable to disbelieve, and this, we think, is the established practice of the great majority of courts."

We sincerely contend that the trial court erred in not sustaining plaintiff's motion for an instructed verdict based on the uncontradicted evidence of the plaintiff corroborated by the defense testimony in all important matters.

THIRD POINT RELIED UPON FOR REVERSAL.

In the assignment of errors printed in the transcript at page 45 you will find the following testimony and record which appellant contends was reversible error and by this ruling and the excluding of this evidence, the jury was confused to such an extent

that it contributed in the manifest error in the judgment here. From page 45, T.R., we quote:

> "The Court erred in sustaining Defendant's objections as follows:
>
> 'Q. Mr. Gordon, will you look in there and get the manifests—all of the manifests?
>
> Mr. Taylor. Just a moment. A point of information. Is Mr. Bell referring to the manifests of the "Elaine G"?
>
> Mr. Bell. Both the manifests of the "Elaine G" and the "Bonnie G".
>
> Mr. Taylor. We object to the manifests of the "Bonnie G", as the earnings of that boat are not in controversy here, your Honor.
>
> The Court. Objection sustained.
>
> Mr. Bell. Exception.' "

Without restating the evidence which has been stated above, we especially call to the Court's attention that Mr. Gordon admitted receiving cash through the Bank of Fairbanks to the extent of $77,791.66 and contends that he paid "Cap" Lathrop $1000.00 personally from the earnings and claims to have borrowed and repaid between five and six thousand dollars; that he declined to give us the facts with relation thereto. Just how much money the defendant actually received in excess of the $77,791.66 that he admitted receiving through the Bank of Fairbanks we do not know, but we do know by all of the admitted facts that the government paid to the Bank of Fairbanks two checks, one in the sum of $44,297.91 and another in the sum of $33,095.52. These the defendant Gordon admitted getting, one September 11, 1945, and the other we

do not have the date. He also admitted getting $308.23 earned by the "Elaine G" in towing a scow and admitted that he was paid $50.00 and $40.00 apiece for the "Elaine G" and the "Bonnie G" for stand-by time and we were refused the privilege of introducing the manifests of the earnings showing the amount of freight actually hauled by the "Bonnie G". While it is true the "Bonnie G" boat and the new barge built by Hager while "Doc" was outside are not in dispute and the title thereto is admittedly in the defendant and plaintiff claims no interest therein, if the Court had permitted the introduction of the manifests that were picked out by the defendant himself as being the manifests of the freight hauled by the "Bonnie G", then it would have been very easy to have ascertained the full amount of money that the defendant actually received and it would have clarified the issues so that the jury would not have become so confused.

Since Clyde E. Gordon, the defendant, testified that they were working together, each hauling all he could and the earnings of each boat and barge were applied to the cost of each man's equipment; therefore, by the introduction of the manifests of the "Bonnie G", it would have cleared and unquestionably have shown by indisputable facts that the cost of the building of the "Elaine G" and the barge and the building of the new barge for the defendant, Mr. Gordon, and the cost of rebuilding the "Bonnie G" was all paid for with plenty left over, but by the ruling of the Court, it left the matter confused and could have been the cause for the returning of the verdict that was such a travesty on justice as herein referred to.

FOURTH POINT RELIED UPON FOR REVERSAL.

We wish to present for our fourth point relied upon for reversal our fifth and sixth assignments of error, which are as follows:

V.

"That the Court erred in rendering the judgment that it did render on March 2, 1948, denying Plaintiff any recovery and taxing all of the costs of said case against the Plaintiff."

VI.

"The Court erred in rendering a judgment in favor of the Defendant and against the Plaintiff for $5,000.00 attorney's fees without any evidence whatsoever having been introduced or even offered to base such judgment on, and that said judgment is unauthorized, unjust, excessive, oppressive and beyond the powers of the Court to render, and there is no just reason therefor, and there is no valid statute of the Territory of Alaska and no laws of the United States of America authorizing such judgment."

It must be remembered that while this case was pending, Section 4065 of C. L. A., 1933 was amended by the Alaska Territorial Legislature. The Section 4065, 1933 C. L. A., is as follows:

"Sec. 4065. What disbursements party entitled to costs may be allowed. A party entitled to costs shall also be allowed for all necessary disbursements, including the fees of officers and witnesses, the necessary expenses of taking depositions by commission or otherwise, the expense of publication of the summons or notices, and the

> postage where the same are served by mail, the compensation of referees, and the necessary expense of copying any public record, book or document used as evidence on the trial. The prevailing party may tax as costs the sum of twenty dollars when the case is dismissed before it is set for trial after appearance by the opposite party, and the sum of forty dollars when not disposed of until after it is set for trial; for each deposition such sum as may be allowed by the court; the per diem actually paid the court reporter but not to exceed ten dollars per day; witness fee for each day a witness is necessarily absent from his usual place of abode by reason of attendance upon court, with traveling expenses at fifteen cents per mile actually and necessarily travelled; a party to the action, if a witness, shall be entitled to the same fee and travelling expense as any other witness; and a reasonable attorney's fee to be fixed by the court. (1345-CLA; 1-38-23)."

In 1937 this statute was amended by striking the words, "and a reasonable attorney's fee to be fixed by the court." Then in 1947 the statute was amended again by adding the same words, which makes the law read as it did before either amendment was made, and as set forth above.

This is the only authority by which the trial judge could have granted an attorney's fee to the defendant's attorney in the sum of $5,000.00. The trial of the case consumed a part of three days and there was not a scintilla of evidence either by affidavit or oral testimony as to the extent of the work performed by the attorney for the defendant and not a word as to

the value of the services rendered and not even an oral motion made in open Court to allow the defendant an attorney's fee. This matter all having arisen in the mind of the trial judge clearly indicates the bias and prejudiced attitude of said judge. There was not a scintilla of evidence throughout the entire trial to even suggest bad faith on the part of the plaintiff or to disprove or question his sincere effort to regain the custody of the property that he had had in his possession for more than a year, which had been unjustly taken from him while it was dry-docked on the Chena River below the town of Fairbanks. The defendant always referred to the property as the plaintiff's boat and barge and the ownership and right of possession was never seriously disputed, and unquestionably there is not a scintilla of evidence contradicting the plaintiff's right of possession. He had possession of it from the time it was built until it was wrongfully taken by the defendant. Therefore, it could not conscientiously be said that the plaintiff, even if the Court should hold he was not entitled to the property, had ever wrongfully or fraudulently brought this lawsuit, which would justify the Court in voluntarily assessing a $5,000.00 attorney's fee against him. This only goes to show malice, prejudice and ill feeling toward this young service man whose record, as far as is ascertainable, is spotless. We believe the law to be that an attorney's fee of this kind based upon the statute above qouted, rendered without any evidence to support the same is error and in support of our position we cite the following cases, to-wit:

The above-mentioned statute being taken originally from Oregon, and the Supreme Court of Oregon having passed on practically the same question involved here, we will first cite Oregon cases.

For the sake of brevity in this brief we will first cite *Columbia River Door Co. v. Todd et al.,* 175 Pac. 860. This case is based upon old cases as far back as 1885, such as:

Bowles v. Doble, 11 Or. 474, 5 Pac. 918;
Bradtfeldt v. Cooke, 27 Or. 194, 40 Pac. 1, 50 Am. St. Rep. 701;
Cox v. Alexander, 30 Or. 438, 46 Pac. 794;
First National Bank v. Mack, 35 Or. 122, 57 Pac. 326;
Lassas v. McCarty, 47 Or. 474, 84 Pac. 76;
Wright v. Conservative Investment Co., 49 Or. 177, 89 Pac. 387;
Waymire v. Shipley, 52 Or. 464, 97 Pac. 807;
Mael v. Stutsman, 60 Or. 66, 117 Pac. 1093;
Sattler v. Knapp, 60 Or. 466, 120 Pac. 2.

From the *Columbia River Door Co. v. Todd* case above cited we quote the first syllabus, which is as follows:

> "That counsel agree to allow the court to determine attorney's fees in a lien foreclosure case does not obviate the necessity of introducing evidence upon which the court may base a finding as to an issue of fact."

The *Columbia River Door Co.* case above cited was followed by the Supreme Court of Oregon in the case of *State v. Ganong et al.,* 184 Pac. 233. The Legis-

lature of Oregon had passed an act, a part of which reads (quoting from page 237 above case):

> "The costs and disbursements of the defendant, including a reasonable attorney's fee to be fixed by the court at the trial, shall be taxed by the clerk and recovered from the corporation, * * *."

Another act in Oregon, Section 7448, L. O. L., provides (copying from page 239, same case):

> "The court shall, upon entering judgment for the plaintiff, allow as a part of the costs all moneys paid for the filing and recording of the lien, and also a reasonable amount as attorney's fees."

This case being an appeal principally on the question of allowing an attorney's fee the last paragraph of the opinion clearly sets forth the views of the Supreme Court of Oregon at the time this case was decided and construes exactly the same words as are used in the Alaska statute as amended, which is now being considered, except the Oregon statute reads: "Including a reasonable attorney's fee to be fixed by the court at the trial."

The wording of the other Oregon act, 7448 above mentioned is: "* * * also a reasonable amount as attorney's fees."

The Alaska Statute uses these words: "and a reasonable attorney's fee to be fixed by the court."

You will note the content of each of the statutes is identical and means exactly the same thing. The last

paragraph on page 239 of the 184 Pac., is very definite, and is as follows:

"(6) It is true that in Portland Sash & Door Co. v. Parker, 61 Or. 203, 121 Pac. 1135, and in Wills v. Zanello, 59 Or. 291, 117 Pac. 291, it was stipulated by the litigants that the court could fix the amount of an attorney's fee, and, based upon such stipulation, the court did fix the fees. But in neither of those cases were any of the questions now under consideration raised or discussed or decided, and hence neither of those decisions should be regarded as a precedent. All the arguments that have been here advanced in support of the position taken by the defendants, including the argument growing out of the difference between fees allowed by statute and those stipulated for by contract as well as the argument based upon the records made in Portland Sash & Door Co. v. Parker, 61 Or. 203, 121 Pac. 1135, and Wills v. Zanello, 59 Or. 291, 117 Pac. 291, and also the argument predicated upon the holdings made in some of the other states, were presented and considered in Columbia River Door Co. v. Todd, 90 Or. 147, 175 Pac. 443, 860; and in that case this court squarely decided that the attorney's fee allowed by the statute was an issuable fact to be pleaded and proved by evidence. The act of 1913 was not intended to dispense with pleading and evidence. Not even 'costs and disbursements' can be allowed a successful litigant in any suit or action unless he pleads his 'costs and disbursements' by filing a verified cost bill, and if the defeated litigant desires to contest the cost bill he must do so by filing verified objections, and these two verified papers constitute the

pleadings. The statute of 1913 does not contemplate that the person presiding 'at the trial' shall be a compulsory witness and at the same time and in the same proceeding be the judge of his own testimony. There was no evidence upon the subject of attorney's fees, and there was no stipulation fixing the amount of an attorney's fee; and therefore to allow an attorney's fee is to repudiate an express ruling made less than one year ago, and after the most careful and deliberate consideration, in Columbia River Door Co. v. Todd, 90 Or. 147, 175 Pac. 443, 860, as well as to overrule every precedent dealing with the subject. McInnis v. Buchanan, 53 Or. 533, 542, 99 Pac. 929; Sattler v. Knapp, 60 Or. 466, 120 Pac. 2. The judgment appealed from should be modified by striking out the item of $300 for attorney's fee."

The last case that we are able to find that the Supreme Court of Oregon has decided, on this question, is *Edwards v. Wirtz,* 118 Pac. (2d) 114, and on the petition for rehearing based on the matter of allowing an attorney's fee where no evidence was offered Chief Justice Kelley wrote the opinion found on page 120, which is as follows:

"(12) Upon consideration of appellant's petition for rehearing, we find no support in the testimony for respondents' allegation that $300 is a reasonable attorney's fee to be allowed herein. This allegation is denied in appellant's reply. 'Upon this issue no evidence was offered by either party, and this being so, the statutory fee only will be allowed.' Lassas v. McCarty, 47 Or. 474, 484, 84

P. 76, 80. See cases there cited. Also Columbia River Door Co. v. Todd (on petition for rehearing), 90 Or. 147, 154, 175 P. 443, 860, and cases there cited."

"In the case at bar, we find no stipulation authorizing the trial court to fix the fee; and hence such cases as Olson v. Boling, 120 Or. 554, 252 P. 961, and Randolph v. Christensen et al., 124 Or. 661, 671, 672, 265 P. 797, are not in point."

"The former opinion is therefore modified to the effect that the allowance of $200 as a reasonable attorney's fee in favor of defendants should be and is deleted from the final decree herein."

In the case of *Burleigh Bldg. Co. et al. v. Merchant Brick & Building Co.,* 59 Pac. 83, the Court of appeals of Colorado on November 13, 1899, passed on this question, the 4th syllabus reads as follows:

"4. On foreclosure of a mechanic's lien it is error to render judgment for attorney's fees without evidence of the services performed and their value."

In the case of *Holmes v. S. H. Kress & Co. et al.,* 223 Pac. 615, the Supreme Court of Oklahoma in passing on this question, said in the first and only syllabus as follows:

"Section 7482, Comp. St. 1921 (section 3877, Rev. Laws 1910), authorizing the recovery of a reasonable attorney's fee by the prevailing party, in action brought to establish a statutory lien, and that same may be fixed by the court and taxed as cost, in the action does not authorize the court to

render judgment for the amount prayed for by the prevailing party as an attorney's fee without a hearing on the question and the taking of evidence, to determine what is a reasonable fee in the given case.

The above case followed the case of *Holland Baking Co. v. Decks,* 170 Pac. 253. The 5th syllabus reads:

"5. Costs—Attorney's Fees—Evidence—Statute. Where an action is brought upon a promissory note for the foreclosure of a lien upon collateral given to secure the payment of said note, an attorney's fee, under section 3877, Revised Laws 1910, may be awarded the successful party in the action and taxed as costs, but the trial court is without authority to award such attorney's fee without evidence as to the value of such attorney's fee."

The above Oklahoma cases have been cited with approval in the following Oklahoma decisions:

L. S. Cogswell Lumber Co. v. Foltz et ux., 275 Pac. 333;

Bilby et al. v. Gibson et al., 271 Pac. 1026;

Board of Education of Oklahoma City v. Thurman, 247 Pac. 996;

United States Fidelity & Guaranty Co. v. Town of Comanche et al., 246 Pac. 238.

Getman v. Hayhow, 229 Pac. 559;

Oklahoma Pipe Line Co. v. Hoefer, 229 Pac. 440;

Holiday Oil Co. et al. v. Smith et al., 228 Pac. 775.

The Supreme Court of Kansas on July 9, 1891, in the case of *State ex rel. Curtis County Attorney v. Durein et al.,* 27 Pac. at 148, established the rule in Kansas, which is as follows:

> "4. Upon the rendition of a judgment in such contempt proceeding the court rendering the same may allow a reasonable attorney's fee in favor of the plaintiff and against the defendant therein, to be taxed and collected with other costs in the case; but no such allowance can be made in the absence of any proof as to what constitutes a reasonable fee."

Indiana follows this same rule, see *Kindel v. French,* 131 N. E. 277.

The Supreme Court of Indiana in the following cases upheld the rule laid down in the above cited case.

Legros v. Culberson, 134 N. E. 907;
Winslow Gas Co. et al. v. Plost, 122 N. E. 594;
E. Horn Realty & Investment Co. v. State ex rel. Lindsey, 180 N. E. 871;
Jackson et al. v. J. A. Franklin & Son et al., 23 N. E. (2d) 23;
Waverly Co. et al. v. Moran Electric Service, Inc., 26 N. E. (2d) 55.

Sixth syllabus reads as follows:

> "6. Mechanic's Lien. In the foreclosure of a mechanic's lien, it is error to include an allowance for attorney's fees where there is no evidence offered as to the value thereof."

The Supreme Court of Florida in 1903 in the case of *Gunby et al. v. Drew,* 34 Southern 305, passed on this question, and the first syllabus reads as follows:

> "1. It is error to allow an attorney's fee to the prevailing plaintiff under the lien law (Rev. St. 1892, §1747) without proof of the reasonableness of the amount thereof."

There being no evidence whatsoever upon which to pass upon as to the value of the services rendered or the amount of work done, and there being nothing alleged in the pleading as to the extent of the services rendered or the value there, and only having been mentioned in the prayer, and the prayer being no part of the allegations, then there was no proper pleading for attorney's fee. (See T.R. pp. 6 and 7.)

We humbly contend that the rendering of the $5,000.00 judgment for attorney's fee was unauthorized under the circumstances, and was error and should be reversed.

FIFTH POINT RELIED UPON FOR REVERSAL.

Appellant wishes to make his XI Assignment of Error his Fifth Point relied upon for reversal, and especially that part thereof with reference to the incompetent evidence permitted to go before the jury effecting the income tax and depreciation to be taken off the earnings of the boat and barge.

What difference did it make, between the plaintiff and defendant, as to whether either had paid their income tax? It is conceded for the purpose of argu-

ment here that neither had done so and the depreciation of the value of the boat and barge could not possibly enter into the question of who had the right of possession.

If the plaintiff had the right, he would have the right of possession in its then condition; if it had depreciated at all that would be his loss, and the question of depreciation would be a matter between him and the government as it effected his income tax, and the same rule would apply to that boat and barge of the defendant.

This is a claim and delivery action between Hager and Gordon, and the United States Government will not be affected in the least by the outcome. At the end of this litigation, someone will be required to pay income tax to the extent of the earnings of each boat and barge.

The Court erred in permitting any testimony concerning the income tax or the depreciation, it only acted to confuse the jury. Then the one and only question on the first cause of action was the right of possession of the "Elaine G" and the barge used in connection therewith, and it was admitted that the plaintiff had had possession of it from the beginning, and had lived on it until he had to move off on the account of fire insurance, and then it is admitted that the defendant took this boat and barge without the consent of plaintiff, from the bank of the Chena River, where he had it dry-docked.

It seems reasonable to us, that each party was entitled to possession of his own boat and barge, and each would be liable to the government for his own income tax, and this evidence going before the jury only helped to confuse them, and the Court committed error in allowing this incompetent evidence to go before the jury.

CONCLUSION.

In conclusion, we humbly contend, that where in the course of human events a terrible injustice has been done some one is responsible, and the Appellate Courts have so many times in the past corrected such rank injustice.

In this case it is so clear to us, that the appellant, the plaintiff below, Warren L. (Bud) Hager, having had the experience in river boat freighting in Alaska, and knowing of the great volume of this, that the Army needed, had the idea of building a boat and barge. Plaintiff and another man were going to pool their resources and borrow all they could and build as large equipment as the money would allow.

The plaintiff went to the defendant, Gordon (Uncle Doc), to request that Charlie Smelzer, who was employed by Gordon, be permitted to work for them, if he could spare him. He disclosed his plans to Gordon; Gordon liked the idea; wanted the plaintiff, Hager, to go in with him; didn't want the other man in on the deal. Gordon took the plaintiff to the bank;

they made arrangements for borrowing the money. Gordon said, "I will go outside and arrange for the purchase of the machinery, you build yourself a boat and barge and build me a barge just like the one you are building for yourself." Warren L. (Bud) Hager agreed. Gordon went outside and spent the winter. Hager leased a site; purchased a quonset hut; cleared off the place; set up a work shop there; carried on the building of his boat, the "Elaine G" and the barge for himself and one for Gordon. Mr. Gordon returned to Alaska. When they were finished except the pilot house on top of the "Elaine G", they were launched and moved below the bridge.

Please bear in mind that each testified that the cost of material and labor used above the bridge should be charged one-third to the defendant, Gordon, and two-thirds to the plaintiff, Hager, and that for the work on the plaintiff Hager's boat done below the bridge, and the cost of operation, including fuel, food, employees, etc., should be charged to him; the same thing as to Gordon's boat, the "Bonnie G". Gordon rebuilt the "Bonnie G," where it was docked below the bridge; then with fine equipment both left on July the 4th, to each haul all the freight they could; each make all the money they could. Every thing that each man earned with his equipment would go to pay off the cost thereof. This went to the bank that furnished the money to build and remodel each man's equipment.

All indebtedness to the bank was then paid off. The defendant, Gordon, testified that he had $2,000.00

at the beginning; that they borrowed at the Bank of Fairbanks $37,000.00, and that he borrowed something like $6,000.00 more from mysterious persons that he refused to explain or disclose the source thereof, but said he borrowed altogether about $40,000.00 (See T.R. p. 91.) The Bank of Fairbanks received, for hauling done by both men with their equipment, two checks from the United States Goverment, which amounted to $77,393.43; which was applied to Gordon's benefit, out of which the bank was paid $37,000.00. Gordon must have at least a part of the balance of $40,393.43, the difference, plus the amount he admitted getting for the plaintiff's towing a scow for the Alaska railroad and other items. (See T.R. p. 58.) Gordon, also, had a new large power-driven barge, that must have cost one-half as much as the cost of the plaintiff's equipment, and in addition to this he had the "Bonnie G" all rebuilt; a new engine therein and new machinery installed.

Then the next spring Gordon took all of his equipment, as well as the boat and barge belonging to the plaintiff, and went off down the river for another season's hauling; which was all over before this case was tried.

Warren L. (Bud) Hager testified that the use of his boat, the "Elaine G" and barge, and the damage done thereto during this period, would be at least $10,000.00, and this stands undenied, although, the defendant was on the witness stand and had ample opportunity to deny it.

Then the trial judge heaped another injustice on the plaintiff, while he stood pennyless as far as the whole enterprise was concerned, by rendering a judgment against him for all of the costs and an attorney's fee of $5,000.00.

We plead with this Honorable Court to do justice between these parties by rendering the judgment that should have been rendered in the case below, by sustaining the plaintiff's motion for an instructed verdict, and by setting aside all judgments for attorney's fee and costs.

Dated, Fairbanks, Alaska,
September 10, 1948.

Respectfully submitted,
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